Future Heritage Sdn Bhd v Intelek Timur Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO-W-02-202 OF 2001

ABDUL HAMID MOHAMAD, RICHARD MALANJUM AND ARIFIN ZAKARIA JJCA

1 NOVEMBER 2002

Arbitration *— Award — Setting aside — Application — Arbitrator drew wrong inferences of facts — Failure to analyze and appraise evidence — Whether sufficient ground to set aside award — Whether error of law appeared on the face of the award — Whether court may interfere with award of arbitrator*

The appellant was appointed the contractor for the respondent, the developer. The parties based their relationship on the Standard Agreement and Schedule of Conditions of Building Contract ('the contract') of the Pertubuhan Akitek Malaysia (PAM). One of the conditions therein was that in the event of a dispute arising between the parties it must be referred to an arbitrator. It was also one of the conditions in the contract that all progress claims of the appellant would be subject to 60 days credit period. The gist of the dispute between the parties was whether there was any basis for the appellant to assert that under the terms of the contract there was a default on the part of the respondent in not making the payments within the 60-day credit period. In turn, the respondent alleged that the appellant was in breach of the contract when it ceased work without any valid reason. The arbitrator dismissed the claim of the respondent and allowed the counterclaim of the appellant. Dissatisfied with the award, the respondent applied to the High Court seeking to, inter alia, set aside the award. The High Court set aside the award and dissatisfied with the decision, the appellant now appeals to this court.

Held, allowing the appeal:

(1) The arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion unless it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance. An arbitrator is the sole judge of facts and whether he drew the wrong inferences of facts from the evidence itself is not sufficient as a ground to warrant setting aside the award (see p 60E–G).

(2) Mere failure to analyze and appraise the evidence does not vitiate the award on the ground of misconduct. It is only when the evidence is material, relevant and had gone to affect the award that the award will be vitiated. Accordingly, as this case emanated from an arbitration proceeding, the learned judge was not entitled to construe the said contract in the way as he did. To agree with him would tantamount to converting the proceeding before him

to an appellate hearing which would be contrary to settled legal principle (see p 61B–C). A

[**Bahasa Malaysia summary**

Perayu telah dilantik sebagai kontraktor untuk responden, pemaju tanah. Pihak-pihak telah mendasari hubungan mereka atas Perjanjian Piawai dan Syarat-Syarat Berjadual Kontrak Pembinaan ('kontrak tersebut') Pertubuhan Akitek Malaysia ('PAM'). Salah satu daripada syarat-syarat berikut adalah di mana sekiranya berlaku satu pertikaian antara pihak-pihak, ia harus dirujuk kepada seorang penimbangtara. Ia juga satu daripada syarat-syarat dalam kontrak tersebut di mana semua tuntutan-tuntutan progresif perayu tertakluk kepada tempoh kredit selama 60 hari. Inti pati pertikaian antara pihak-pihak tersebut adalah sama ada terdapat apa-apa asas untuk perayu menegaskan bahawa di bawah terma-terma kontrak tersebut wujud satu kegagalan di pihak responden yang tidak membuat pembayaran dalam tempoh kredit 60 hari itu. Sebaliknya, responden menyatakan bahawa perayu telah melanggar kontrak tersebut apabila ia berhenti menjalankan kerja tanpa apa-apa sebab yang sah. Penimbangtara telah menolak tuntutan responden dan membenarkan tuntutan balas perayu. Berasa tidak puas hati dengan award tersebut, responden telah memohon ke Mahkamah Tinggi untuk, antara lain, mengenepikan award tersebut. Mahkamah Tinggi telah mengenepikan award tersebut dan berasa tidak puas hati dengan keputusan tersebut, perayu sekarang membuat rayuan ke mahkamah ini. B C D E

Diputuskan, membenarkan rayuan tersebut: F

(1) Keputusan penimbangtara tidak boleh diketepikan hanya kerana mahkamah akan tiba kepada satu kesimpulan yang berbeza dari penimbangtara kecuali jika ia kelihatan pada permukaan award tersebut bahawa penimbangtara tersebut telah bertindak menyalahi undang-undang, seperti contohnya, dengan memutuskan atas keterangan yang tidak boleh diterima, atau atas prinsip-prinsip pembentukan di mana undang-undang tidak bersetuju dengannya. Seorang penimbangtara adalah satu-satunya yang mengadili fakta-fakta yang salah dan sama ada beliau tiba kepada inferen fakta-fakta daripada keterangan itu sendiri adalah tidak mencukupi sebagai satu alasan untuk mengenepikan award tersebut (lihat ms 60E–G). G H

(2) Kegagalan semata-mata untuk menganalisakan keterangan tidak menjadikan award tersebut tidak sah atas alasan salah laku. Ia hanya apabila keterangan itu adalah material, relevan dan telah memberikan kesan kepada award tersebut barulah award tersebut menjadi tidak sah. Sewajarnya oleh kerana kes ini timbul daripada satu prosiding timbangtara, hakim yang bijaksana tidak berhak untuk menafsirkan kontrak tersebut sebagaimana beliau telah I

A lakukan. Untuk bersetuju dengan beliau sama seperti menukarkan prosiding di hadapan beliau kepada satu perbicaraan rayuan yang bertentangan dengan prinsip undang-undang yang tetap (lihat ms 61B–C).]

B **Notes**

For cases on setting aside of arbitration award, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 957–959.

C **Cases referred to**

Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor [1999] 2 MLJ 481 (refd)

Ong Guan Teck & Ors v Hijjas [1982] 1 MLJ 105 (refd)

Sharikat Pemborong Pertanian & Perumahan v Federal Development Authority [1971] 2 MLJ 210 (refd)

D **Appeal from:** Originating Motion No R2–25–67 of 2000 (High Court, Kuala Lumpur)

Suria Kumar (*Suria Kumar & Co*) for the applicant.
Ernest Azad (*Ernest Azad & Assoc*) for the respondent.

E **Richard Malanjum JCA** (delivering judgement of the court):

Introduction

F The appellant was a respondent before the arbitrator, Mr Jerry Sum Phoon Mun, in which the respondent herein was the claimant. The appellant, on the other hand, counterclaimed against the respondent for various relief. The arbitrator dismissed the claim of the respondent and allowed the counterclaim of the appellant awarding the total sum of RM2,137,549.70 as contained in the award published on 16 June 2000 ('the award'). The G sum is made up of costs for machineries and materials on site, the balance of claims, accrued interests and variation order payment. Dissatisfied with the award, the respondent, by way of notice of motion applied to the High Court seeking for the following:

(a) the arbitration award dated 16 June 2000 made and published by Jerry Sum Phoon Mun, the arbitrator, and second respondent in this action to H be set aside;

(b) the said matters arising under the reference to the arbitration be remitted to another arbitrator to be appointed by this court for reconsideration;

(c) alternatively, this honorable court decides on the issue of liability between the claimant and the first respondent;

I (d) that there be such further or other relief as may seem just;

(e) that the costs and incidentals to this application be paid by the first respondent to the applicant.

The High Court set aside the award as per prayer (a) hereinabove and dissatisfied with the decision rendered on 26 February 2001 the appellant now appeals to this court.

Background facts

By a letter of award dated 16 November 1996, the appellant was appointed the contractor for the respondent, the developer of a project jointly undertaken with Perbadanan Setiausaha Kerajaan Selangor ('PSKS'), for the construction of Phase III Low Cost Flats Blocks A, B, C, D and E ('the project') on Lots 1703, 2102, 2103, 2125 to 2134 and 2143, Mukim Ulu Langat, Daerah Ulu Langat, Selangor Darul Ehsan.

The parties based their relationship on the Standard Agreement and Schedule of Conditions of Building Contract ('the contract') of the Pertubuhan Akitek Malaysia ('PAM'). One of the conditions therein was that in the event of a dispute arising between the parties it must be referred to an arbitrator to be agreed by them failing which the President or the Vice President of PAM would nominate one for them. In this case, the arbitrator was nominated by the President. It was also one of the conditions in the contract that all progress claims of the appellant would be subject to 60 days credit period.

There was no problem between the parties up to progress claims/certificate of payment No 5 in the payment schedules. However, arrangement was then made that for future progress claims they would be subject to the factoring arrangement entered into by the appellant with Showa Factoring (M) Sdn Bhd ('Showa'). Under that factoring arrangement, the appellant would submit its progress claim together with its invoice for that claim to Showa and an amount equivalent to 80% of the claim would be paid to the appellant by Showa. Upon payment of that particular claim by the respondent to Showa, the 20% balance of the claim would be paid to the appellant less the interest and other charges payable as pre-agreed.

Progress claims/certificates of payment for Nos 6, 7, 8, 9, 10 and 11 were therefore made according to the factoring arrangement. And it was not in dispute that the respondent in those claims exceeded the 60 days credit period before paying Showa and that resulted in the delay for the appellant to receive the 20% balances of the claims. There is also a pending court action commenced by Showa against the respondent but we are not concerned here with that case.

In the interim, the respondent paid and the appellant accepted directly the payment for progress claim No 12 totaling RM417,756.04 made out in two installments of RM250,000 on 21 November 1997, and RM167,756.04 on 27 November 1997 without any accompanying invoice as required under the factoring arrangement.

Subsequently, by a letter dated 10 December 1997, the appellant intimated its intention to determine the contract by reason of the failure of the respondent to pay for the progress claims/certificates of payment Nos 9

A and 10 amounting to RM822,681.28 as notified by Showa. And by way of response, the appellant wrote a letter dated 18 December 1997 to the architect of the respondent stating, inter alia, that it was due to the non-honoring of the interim certificates of payment by the respondent that the progress of works had been severely affected. As such, the appellant had no choice but to determine the contract as from 18 December 1997. By
B another letter dated 19 December 1997, the appellant wrote to the respondent stating that it had no choice but to determine the contract pursuant to cl 26(1)(a) thereof.

The respondent on the other hand, through its architect, M/s AZ Rekateler, issued a notice of termination of employment of the appellant
C dated 24 December 1997 pursuant to cl 25(a) and/or (b) of the contract on the ground that the appellant had stopped works on site since 18 December 1997. In the said notice as well, it was made known that the letters of the appellant dated 10 December 1997 and 19 December 1997 were not acceptable by the respondent on the basis that the certificates Nos 1–12 were honored.

D Hence, the gist of the dispute between the parties was whether there was any basis for the appellant to assert that under the terms of the contract, there was a default on the part of the respondent in not making the payments within the 60-day credit period. In turn, the respondent alleged that the appellant was in breach of the contract when it ceased work without
E any valid reason.

The award

The arbitrator in coming to his final award made several findings and gave his reasons for doing so. He found the following:

F (i) that the respondent did not hand over possession of the site to the appellant on 2 September 1996 but progressively over a period of time, that is, on 20 September 1996 for Block A, on 15 October 1996 for Block B, on 10 November 1996 for Block D and in December 1996 for Blocks D and E;

G (ii) that upon negotiation the completion period for each block of the buildings under the project was extended from 15 to 18 months from the date of possession of site;

(iii) that the period for honouring the progress claim of the appellant was 60 days from the date of submission of such claim;

H (iv) that the respondent did not default in honouring the progress claims for Nos 1–5;

(v) that there was default in honouring the progress claims for Nos 6–11;

(vi) that there was no default in honouring progress claim No 12;

(vii) that the appellant was entitled to receive direct payment for progress
I claim 12;

(viii) that the appellant had lawfully determined its own employment with the respondent pursuant to cl 26(1)(a) of the contract;

(ix) that the subsequent determination of employment of the appellant by the respondent pursuant to cl 25(a) and/or (b) of the contract vide its notice dated 10 December 1997 and another notice dated 24 December 1997 issued by the second architect for the respondent namely AZ Rekateller were improper and unlawful; and

(x) that the appellant was entitled for compensation from the respondent due to the lawful determination of the contract by the appellant.

Under (x) above, there were several heads in which the payments to the appellant were itemized including interest and other miscellaneous payments. These were related to the counterclaim of the appellant.

The decision of the High Court

Although there were various orders sought for by the respondent, the court below granted only one order, namely, the setting aside of the award. In coming to that decision, the learned judge accepted the main contention of the respondent in that there were errors of law on the face of the award and hence the arbitrator had misconducted himself in carrying out his task as such. Amongst the findings of the learned judge were:

(1) that there was misconstruction of clauses in the contract — cl 26(1)(a), cl 26(1)(b) read together with cl 11(4) and cl 27(1)(a) thereby resulting in errors of law on the face of the award;

(2) that there was a failure of arbitrator to consider the submissions of the respondent;

(3) that the arbitrator was biased, in breach of the rules of natural justice and tainted with bad faith in coming to his conclusions;

(4) that there was a failure to consider the legal issue of estoppel as submitted by the respondent;

(5) that there was a failure to analyze and appraise the relevant and admissible evidence; and

(6) that the arbitrator was also guilty of misconduct:

(i) when he inferred that the appellant had cash flow problem when the 20% was not forthcoming There was no evidence to that effect and that issue was not pleaded in the first place by the appellant in its defence and counterclaim;

(ii) the arbitrator was inconsistent in his approach to the various notices of determination of the contract submitted by the parties and finally accepting as valid the subsequent notice of the appellant when the strict procedural requirement was not met for a successful termination of the contract;

(iii) in holding that the 60-day credit period was a strict term of the contract even in the light of the factoring arrangement and in view of the evidence available providing for the payment of interest for the delay to be equally shared by the parties and that itself indicated such term to be otherwise. The award was

A therefore uncertain as to how the matters referred to were decided and thus providing a basis to set it aside;

(iv) the award of 8% interest was an error on the face of the award since there was no evidence led by the appellant to justify the claim of interest at the rate of 13% in the first place. Further the B arbitrator failed to appreciate his role in appraising the evidence before him when interest was even awarded for transport charges; and

(v) the arbitrator did not discount the sum of RM5,469.04 in his computation of the interest on the sum allegedly payable to the appellant.

C

The appeal

The appellant is dissatisfied with the decision of the court below and has submitted several grounds but the core of the complaint is that the learned judge erred in law when he premised his conclusions on flawed grounds. D The appellant contended that the learned judge found errors of law on the face of the award when there was none and disturbed the findings of facts of the arbitrator. It was also submitted that the other failings of the arbitrator such as being biased, in breach of the rules of natural justice and tainted with bad faith as found by the learned judge were in fact absence.

E

The law

Before dealing with the grounds in this appeal, perhaps it is opportune here to have a quick overview of some of the legal principles relating to power of the courts to set aside an award of an arbitrator. And to begin with, I think F the statement of law and the discourse therein in the case of *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481 require no further clarification. This is what Gopal Sri Ram JCA said at pp 487–488:

> The general rule at common law is that, absent a contrary intention in the G agreement to arbitrate entered into between the parties to a controversy, the award of an arbitrator is final, binding and conclusive. It may not be challenged merely on the ground that it is erroneous. As Shah J, said in *Union of India v Rallia Ram* AIR 1963 SC 1685 at p 1691:
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> > 'An award being a decision of an arbitrator whether a lawyer or a layman chosen by the parties, and entrusted with power to decide a dispute H submitted to him is ordinarily not liable to be challenge on the ground that it is erroneous .... The court may also set aside an award on the ground of corruption or misconduct of the arbitrator, or that a party has been guilty of fraudulent concealment or willful deception .... The award of the arbitrator is ordinarily final and conclusive, unless, a contrary intention is disclosed by the agreement. The award is the decision of a I domestic tribunal chosen by the parties, and the civil courts which are entrusted with the power to facilitate arbitration and to effectuate the awards, cannot exercise appellate powers over the decision. Wrong or right the decision is binding if it be reached fairly after giving adequate

opportunity to the parties to place their grievances in the manner provided by the arbitration agreement.' A

So jealously did the common law guard against curial interference with private arbitrations that it was most reluctant to create exceptions to the general rule. The policy of the common law is reflected in the judgment of Williams J, in *Hodgkinson v Fernie* (1857) 3 CBNS 189 where he said:

'The law has for many years been settled, and remains so at this day that, where a cause or matters in difference referred to an arbitrator a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact. ... The only exceptions to that rule are cases where the award is the result of corruption or fraud, and one other, which though it is to be regretted is now, I think firmly established, viz where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted I think it may be considered as established.' B C

Thus, the common law as a very limited exception grudgingly allowed a court to intervene and set aside an award on the face of which there appeared an error of law. That is an important exception that prevails until today. In *Champsey Bhara Co v The Jivraj Balloo Spinning & Weaving Co Ltd* 1923 AIR PC 66, Lord Dunedin, when delivering the advice of the Board, explained the breadth of this limited common law jurisdiction over arbitration awards. He said (at p 69): D

'An error in law on the face of the award means, in their Lordships' view, that you can find in the award or document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound.' E F

Quite apart from the common law, the jurisdiction of the ordinary courts in the environment of private arbitration stems also from statute. Thus, s 24(2) of the Arbitration Act 1952 confers jurisdiction upon the High Court to set aside an award for misconduct by an arbitrator. 'Misconduct' in this context: G

'... is used in its technical sense as denoting irregularity and not moral turpitude. It includes failure to perform the essential duties which are cast on an arbitrator as such, for instance, failure to observe the rules of natural justice, appearance of bias or partiality. It also includes any irregularity of action which is not consonant with the general principles of equity and good conscience. These illustrations are not meant to be exhaustive. But failure to analyze and appraise the evidence does not vitiate the award on the ground of misconduct. It is only when the evidence is material, relevant and had gone to affect the award that the award will be vitiated. In my judgment the plaintiffs' complaint is sustainable only if the failure to do so had occasioned some irregularity causing a miscarriage of justice that is apparent on the face of the award (per Raja Azlan Shah J (as he then was) in *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210 at p 211.)' H I

I have searched in vain for a better description of what Parliament meant by the use of the expression 'misconduct' in the Act of 1952.

In my judgment, the jurisdiction to set aside or to remit an arbitrator's award whether at common law or under statute is one that should be exercised with great care and with a proper sense of responsibility. One may do well to keep in mind the words of Sharma J in *Puri Construction Pvt Ltd v Union of India* 1989 AIR SC 777 at p 780:

> 'When a court is called upon to decide the objections raised by a party against an arbitration award, the jurisdiction of the court is limited, as expressly indicated in the Arbitration Act and it has no jurisdiction to sit in appeal and examine the correctness of the award on merits.'

Hence, by way of summary the relevant legal principles applicable to the present case may be shortly stated thus:

Firstly, on findings of facts an arbitrator is the sole judge. Further, whether he drew the wrong inferences of facts from the evidence itself is not sufficient as a ground to warrant setting aside his award (see *GKN Centrax Gears Ltd v Matbro Ltd* [1976] 2 Lloyd's Report 555).

Secondly, when dealing with an award of an arbitrator the court is not rehearing the matter. The court is only to determine if there is an error of law on the face of the award. And as to what is 'error of law' Raja Azlan Shah J (as he then was) had this to say in *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210 at p 211:

> Let me state here that this is not a re-hearing. My sole purpose is to determine whether there is error of law on the face of the award. With regard to the first point, I am not satisfied that the arbitrator had drawn wrong inferences of fact from the evidence. Even if he did, that by itself is not sufficient as a ground to warrant setting aside the award. It would be contrary to all the established legal principles relating to arbitration if an award based upon the evidence presented were liable to be reopened on the suggestion that some of the evidence had been 'misapprehended and misunderstood' (see *In re Great Western Railway Co and HM's Postmaster-General* (1903) 19 TLR 636). The allegation that the arbitrator held that the plaintiffs were estopped from challenging the validity etc of the progress payment certificates is based on a false premise. I find nowhere in the award that the arbitrator had stated his finding on such lines. With reference to the third objection, the plaintiffs argued that the correct interpretation of their letter was 'that the works not mentioned in their letter had been fully completed,' but the arbitrator interpreted it 'that the works mentioned therein had not yet started and that it did not mean that the works not mentioned therein had been fully completed.' The said letter was strongly relied upon by the plaintiffs to substantiate their allegation that the superintending officer had not given sufficient and adequate attention with regard to the measurement of works done. In my opinion the question is one of construction and of applying it. As long as it is capable of a meaning it will ultimately bear that meaning which the arbitrator decides is its proper construction, and the arbitrator will decide its application. Assuming the arbitrator had erred in interpretation, that in my opinion was only a mistake on his part. That per se is not sufficient as a ground to set aside the award. *Worsdell v Holden* 1 LT 14 is authority for the well established principle that misconstruction of letters of an arbitrator as

amounting to a mistake is not a ground for revoking the award. Parties who submit their cases to arbitration know fully well that arbitrators are fallible; they consent to take them with all their faults. In my judgment, in the context in which the letter was written, the arbitrator was correct in arriving at his conclusion after comparing the visiting manager's reports dated 11 January and 28 January 1967. I am satisfied that the award contains no error of law on its face.

Thirdly, s 24(2) of the Arbitration Act 1952 reads:

(2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside.

In considering that section, this is what Hashim Yeop A Sani J (as he then was) had to say in the case of *Ong Guan Teck & Ors v Hijjas* [1982] 1 MLJ 105 at p 106:

As referred to earlier in the judgment s 23 of the Arbitration Act 1952 seems to confer a wide discretion for the court to remit an award. However, the power of the court to set aside an award is not unlimited and s 24(2) of the Act provides that the High Court may set aside an award only where an arbitrator or umpire has misconducted himself or the proceedings or the award had been improperly procured. The language of s 24(2) would seem to be rather narrow and limited. In other words, the power of the High Court to set aside an award is restricted to cases where some form of dishonesty or bias is shown.

Fourthly, since our Arbitration Act 1952 (the Act) is derived from the then English Arbitration Act 1950 the legal principles enunciated by the English courts are quite relevant. Thus, in 2 *Halsbury's Laws of England*, (4th Ed) para 623 states:

An arbitrator's award may be set aside for error of law appearing on the face of it, though the jurisdiction is not lightly to be exercised. Since questions of law can always be dealt with by means of a special case this is one matter that can be taken into account when deciding whether the jurisdiction to set aside on this ground should be exercised. The jurisdiction is one that exists at common law independently of statute. *In order to be a ground for setting aside the award, an error in law on the face of the award, must be such that there can be found in the award, or in a document actually incorporated with it, some legal proposition which is the basis of the award and which is erroneous.*

If a specific question of law is submitted to the arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the award bad on its face so as to permit it being set aside; and where the question referred for arbitration is a question of construction, which is, generally speaking a question of law, the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion; *but if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award* (see also *Government of Kelantan v Duff Development Company, Limited* [1923] AC 395).

A *But the court is not entitled to draw any inference as to the finding by the arbitrator of facts supporting the award; it must take the award at its face value* (see also *James Clark (Brush Materials), Limited v Carters (Merchants), Limited* [1944] KB 566). (Emphasis added.)

The grounds and findings

B Before proceeding to deal with the grounds advanced for the appellant, it should be noted that the effect of the decision of the court below to set aside the award was to return the parties to their pre-arbitration positions without more.

C Further, as the grounds of appeal submitted by the appellant are quite intertwined we propose to consider them as a whole vis-a-vis the decision of the court below and the award.

Now, having perused the materials before us and having heard the respective submissions of learned counsel for the parties we agree that the crux of the matter is on the determination of the contract vis-a-vis the D relevant provisions therein.

The court below held, inter alia, that most of the findings of the arbitrator pertaining to the determination of the contract were erroneous due to the misconstruction of the clauses therein in particular cl 26(1)(a). The issue therefore is whether the learned judge was entitled to do as he did.

E Clause 26(1)(a) reads:

(1) Without prejudice to any other rights and remedies which the Contractor may possess, if —

(a) The Employer does not pay to the Contractor the amount due on any certificate within the Period for Honouring Certificates named F in the appendix to these Conditions and continues such default for seven days after receipt by registered post or recorded delivery of a notice from the Contractor stating that notice of determination under this Condition will be served if payment is not made within seven days from receipt thereof:

.....

G then the Contractor may thereupon by notice by registered post or recorded delivery to the Employer or Architect forthwith determine the employment of the Contractor under this Contract; provided that such notice shall not be given unreasonably or vexatiously.

Hence, the above clause set the pre-requisites and procedure to be complied H with for the determination of the employment of the appellant under the contract. Firstly, there must be a failure on the part of the respondent to pay the appellant the amount due in any certificate within the period specified and in this case it was 60 days. Next, the appellant must issue and serve by way of registered post or recorded delivery a notice to the respondent stating that a notice of determination would be issued unless payment made within I the next seven days after receipt of such notice. And if no payment is made within seven days after the receipt of the notice, the appellant may issue a notice of determination of its employment under the contract and to be

served by way of registered post or recorded delivery. The right to issue such notice is subject to a proviso that it shall not be given unreasonably or vexatiously. A

In finding that the determination by the appellant of the contract was lawful, the arbitrator asked himself three questions, namely, whether there was default by the respondent in honouring payments and if so, whether that had serious effect on the cash flow of the appellant. Another question was whether there was a strict procedural compliance as laid down in cl 26 of the contract. Indeed, the court below in coming to its decision proceeded along the same line. B

In respect of the first question, it is in fact the first pre-requisite stated in the said clause and obviously a question of fact to be considered if necessary in the light of the other relevant clauses in the contract and the evidence adduced before the arbitrator. The arbitrator in the present case found that there was a default despite the factoring arrangement with Showa since any delay had the effect of depriving the appellant the balance amounting to 20% of the claims. In short, the arbitrator construed the first pre-requisite in the said clause to mean that any delay in payment to Showa would also be a delay to the appellant. C D

The learned judge in the court below viewed the foregoing construction flawed since the factoring arrangement was not considered as having varied the strict requirement of the 60 days period. The learned judge was in favor of such a construction since there was also an agreement between the appellant and the respondent pertaining to the equal sharing in the payment of the interest charged by Showa for the factoring arrangement. E

No doubt the construction of the relevant clauses, in particular cl 26(1)(a) of the contract, is a question of law. However, 'the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion unless it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance'. F

Further, it is a settled legal principle that an arbitrator is the sole judge of facts. Whether he drew the wrong inferences of facts from the evidence itself is not sufficient as a ground to warrant setting aside the award. G

In the present case, the arbitrator was well aware of the factoring arrangement yet he construed the clause as he did, inter alia, that there was a default in honouring payments within the 60-day credit period for progress claims Nos 6, 7, and 8 to Showa resulting in the delay of the 20% balance due to the appellant and a complete failure in payments for progress claims Nos 9, 10 and 11 to Showa which in turn deprived the appellant of the 20% balance due. Indeed it is a matter of inference whether the factoring arrangement had varied the strict 60-day credit term as stipulated in the contract. The learned judge inferred that the subsequent arrangement between the parties to pay equally the interest charged by Showa indicated a variation or relaxation of the strict 60 days credit period. The arbitrator did not make such an inference preferring to consider the draft agreement H I

on the issue to be inadmissible since it was unsigned. In our view such an omission on his part should not warrant the setting aside of the award since in law that would not be sufficient as a ground based on the legal principle that it 'would be contrary to all the established legal principles relating to arbitration if an award based upon the evidence presented were liable to be reopened on the suggestion that some of the evidence had been "misapprehended and misunderstood"'. Indeed, mere 'failure to analyze and appraise the evidence does not vitiate the award on the ground of misconduct. It is only when the evidence is material, relevant and had gone to affect the award that the award will be vitiated'.

Accordingly, as this case emanated from an arbitration proceeding we do not think the learned judge was entitled to construe the said clause in the way as he did. To agree with him would tantamount to converting the proceeding before him to an appellate hearing which would be contrary to settled legal principle.

In addition, we do not think it is inconsistent with any legal principle of construction thereby justifying the setting aside of the award just because the arbitrator construed the delay in the payment to Showa as equivalent to delay in payment to the appellant.

Similarly, in respect of the second question posed by the arbitrator, namely, whether the default in the payment by the respondent resulted in serious disruption to the cash flow of the appellant, we are of the opinion that it also entailed an inference of fact based on the evidence available. Although it was not a pre-requisite for the determination of the contract in our view such inference was made by the arbitrator arising from the earlier finding of fact that the respondent defaulted in the payments of the progress claims. It would be wrong to say as was stated by the learned judge in the court below that it was on the basis of cash flow problem that the notice of determination was issued. It follows as well that it would be quite irrelevant to say that the pleadings of the appellant failed to plead the issue of cash flow problem. Accordingly being only a factual inference, it should not be a basis to say that there was misconstruction of cl 27(1)(a) of the contract and thus a misconduct on the part of the arbitrator. And this brings to mind what was said by Gopal Sri Ram JCA in *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* at p 489:

> In my view, the *Ganda Edible Oils* case ([1988] 1 MLJ 428) is not, and should not be read, as authority for the proposition that the ordinary courts are seised of jurisdiction to remit or set aside the award of an arbitrator on the ground that wrong inferences of fact had been drawn or that inadmissible evidence had been let in and acted upon. To do so would amount, in my respectful view, to the unwarranted exercise of an appellate function over private arbitrations which, of course, courts do not have. So far as inferences of fact are concerned, these really fall within the realm of the merits of the particular dispute and are of no concern of a court when considering an application to set aside an award.

As for the third question, the issue is whether the notices issued by the appellant complied with the requirement of cl 26(1)(a) of the contract. In

the court below, the learned judge made certain observations and findings contradicting the conclusions of the arbitrator. This was what the arbitrator said on the issue:

> As the respondent's (appellant here) letter of 18 December 1997 (CD-2/81) purporting to determine the contract on 18 December 1997 had not been served by 'registered post', it is legally not accepted as a proper notice of determination and thus, the date of determination cannot be 18 December 1997. On the other hand, both the 'Notice of Determination' dated 10 December 1997 (CD-2/97) and the 'Termination of Contract' notice of 19 December 1997 (CD-2/83) were sent by AR Registered, I find them to have been properly served in pursuant to cl 26(1)(a)(sic) and are, therefore, legally acceptable. The date of determination is, therefore, 19 December 1997 and not 18 December 1997 ....

And this was what the learned judge said of the notices.

> The arbitrator had also misconducted himself when he failed to take into consideration the submission of the claimant that the notice of determination dated 18 December 1997 is ineffective in law as it was not sent by registered post (see p 196, exh BHT 9(a)). The respondent admitted therein that their date of determination of contract was 18 December 1997. The arbitrator then selected another letter dated 19 December 1997 as the correct notice of determination. The arbitrator was biased in carrying out exercise of selectively choosing evidence to support his finding that the respondent had properly determined his contract of employment.

Further down the judgment the learned judge continued:

> The notice of determination was also wrong in law in term of procedure. The first respondent in his notice of determination dated 18 November 1997 stated 'our date of determination of contract is on 18 December 1997', ie from the date of the letter. This is an affirmation of determination. This notice is not by registered post (see exh BHT – 9(a), encl 2). The first respondent then sends another notice purportedly by AR Registered but also includes the word By Hand (see exh BHT-9(b)). What was the rationale in doing so and in ignoring admission by the first respondent in his own notice as to the date of determination?...
>
> The arbitrator had misconducted himself when he construed cl 26(l)(a) in the manner he did and is also guilty of being biased in selectively choosing evidence to support his findings. It is abundantly evident that the notice of 10 December 1997 (p 194, encl 2) is defective in law.

Now to appreciate the full impact of those letters referred to herein it is necessary to reproduce them, at least the contents, in toto.

In the letter dated 10 December 1997 addressed and sent by AR Registered post to the respondent, the appellant wrote (shorn of the formalities):

> We refer to the above and the notification by M/s Showa Factoring (M) Sdn Bhd in their letter to us dated 8 December 1997 (Ref- SF/FH/401/97) that you have defaulted in payment on the interim certificates No 9 and 10 amounting to RM822,681.28.
>
> Under cl 26(1)(a) of the conditions of the contract, we hereby serve you the notice of determination.

A We trust you are duly informed.

Another letter dated 18 December 1997 was issued by the appellant and addressed to AZ Rekateler, the second architect of the respondent. In that letter the appellant wrote:

> B We refer to the above and your letter dated 19 December 1997 which we received by fax on 17 December 1997. Our date of Determination of the Contract is on 18 December 1997.
>
> We wish to explain to you again, due to the non honouring of your interim certificates of payment by the client M/s Intelek Timur Sdn Bhd the progress of the works has been severely affected, this was highlighted to you on many occasions, which we believed you are well aware.
>
> C We have no other alternatives under the circumstances but to serve the Notice of Determination on 10 December 1997, which you have been duly informed.
>
> As we see no positive respond from the client, we stand firm on our determination of the contract under cl 26(1)(a) of the conditions of the contract.

D A copy of the above letter was also served on the respondent. However, there was nothing in the letter to indicate the mode of delivery.

Yet another letter was issued by the appellant to the respondent dated 19 December 1997 and sent by AR Registered wherein it stated thus:

> E We refer to the above and our Notice of Determination dated 1 December 1997.
>
> We regret to note that you have failed to respond and continue with the default by your refusal to pay the amount on the certificates of payment to Showa Factoring (M) Sdn Bhd.
>
> F As such, we construed that you have breached cl 30(j) of the conditions of the contract, and accordingly, under cl 26(l)(a) of the same conditions of contract, we hereby determine our employment as the contractor for the above mentioned contract.

A copy of this letter was sent to the second architect of the respondent.

It is obvious in our view that the first letter was the warning notice as G required by cl 26(1)(a) of the contract while the letter dated 19 December 1997 was the actual notice of determination. Both complied with the mode of delivery as specified in cl 26(1)(a) of the contract. It is not therefore surprising for the arbitrator to come to the conclusion as he did pertaining to the date of determination of the contract. The documentary evidence was H before him and he made a finding of fact thereon which in law should be beyond judicial scrutiny. Hence, the query and the views expressed by the learned judge in the court below, including the conclusion that the arbitrator was biased in selectively choosing evidence to support his finding were unnecessary in the circumstances.

Further, for the same foregoing reasons we find that there was no merit I to say that the determination notices issued by the appellant were unreasonable and vexatious or that they were ineffective due to the payment of progress claim No 12.

We do not think the alleged admission by the appellant on the date of determination of the contract would have any effect on the finding of the arbitrator which was based on the documentary evidence. A

It is therefore our considered opinion that the findings of the learned judge in the court below pertaining to the construction of cl 26(1)(a) of the contract by the arbitrator are unfounded and contrary to the settled legal principles governing curial appraisal of arbitration awards. B

In respect of cl 26(2)(b) of the contract read with cl 11(4) thereof in relation to the counterclaim of the appellant, it was the finding of the learned judge in the court below that there was a failure by the arbitrator to consider these clauses and to appreciate the evidence and the submission advanced by the respondent on the issue and thereby breached the rules of natural justice. C

Again we must emphasize that the matter before the court below should not be approached with the mantle of an appellate court. It is not for the court to reopen an award of an arbitrator purely on the suggestion that there has been misapprehension or misunderstanding of the evidence. To do so would be contrary to established legal principles relating to arbitration. In the instant case, that seems to be exactly what the learned judge did in the court below. Accordingly in our view, his finding aforementioned on this issue is therefore quite irrelevant and should not be a basis to find misconduct on the part of the arbitrator. D

It is also a ground in this appeal that the learned judge in the court below erred in law when he concluded that the issue of estoppel was not addressed by the arbitrator in his award when in fact it was done so. Learned counsel for the appellant submitted that the arbitrator dealt with that issue in para 8.2.3 of the award. On the other hand, learned counsel for the respondent argued that it was not considered and that the principle should apply in this case. He contended that the appellant should be estopped from complaining on the performance of the contract after receiving the payment for the progress claim No 12. E F

Now this issue in our view should be looked at from the perspective that the arbitrator had taken the approach that any delay in the payment of a particular progress claim to Showa would also be a delay to the appellant in relation to its 20% of the balance of such claim. That in our view was a conclusion made by the arbitrator based on the evidence before him. Rightly or wrongly, it is a principle of law that it should not be for the court to review such a decision as it would do in an ordinary appeal case. On that basis, we do not think it is therefore available to the respondent to say that the payment for progress claim No 12 rectified or obliterate any default in the payments for the earlier claims. After all, there is no proviso in cl 26(1)(a) of the contract to that effect. Furthermore, there was nothing shown to the arbitrator by the respondent to indicate that the payment for progress claim No 12 arose from any kind of promise given by the appellant so as to trigger the application of the principle of estoppel. Even if it is applicable we are of the view that the arbitrator had that in mind when he ruled as he did in para 8.2.3 of the award. Accordingly, we are of the G H I

opinion that there was no basis for the learned judge in the court below to say that there was a failure to consider estoppel and thus there was an error of law on the face of the award.

There is one other matter which the learned judge found to be an error of law on the face of the award and that was on the finding of the arbitrator pertaining to the handing over of the sites of each block and the completion dates.

On perusal of the award, we find that the arbitrator went to great length to consider the evidence before making his decision which in our view is a finding of fact that is not susceptible to review by the court.

Finally, as learned counsel for the respondent conceded on the issue pertaining to the power of the arbitrator to award interest, it is no longer an issue before us.

In respect of the remaining issues raised by the parties before us and not dealt with here specifically, we are of the opinion that at any rate they are quite immaterial as to render otherwise our conclusion herein.

Conclusion

For the above reasons, we find merits in this appeal and we allow it. The award of the arbitrator is therefore restored and the costs of this appeal and in the court below is to be paid by the respondent to be taxed and paid to the appellant. Deposit paid is to be refunded to the appellant as well.

My learned brothers Abdul Hamid Mohamad and Arifin Zakaria JJCA have read this judgment in draft and have expressed their concurrence.

Appeal allowed.

Reported by Peter Ling